Filed 12/3/04 In re Brandon J. CA6

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

In re BRANDON J., a Person Coming Under the Juvenile Court Law.	H027307 (Monterey County Super.Ct.No. J38521)
THE PEOPLE, Plaintiff and Respondent, v. BRANDON J., Defendant and Appellant.	

Thirteen-year-old Megan J. was walking to a friend's house after school. Two boys across the street talked and laughed, pointed at her, and called her a "whore." As Megan began to run away, the two boys ran after her. One boy grabbed her right arm; Brandon J. grabbed her left breast. Then the boys ran off.

Brandon was three months shy of his 14th birthday, the legal age of presumed capacity to appreciate the wrongfulness of one's conduct. Were the circumstances surrounding the offense such that the statutory presumption of Brandon's incapacity was overcome by clear proof that he did appreciate the wrongfulness of his conduct?

We determine that substantial evidence supports the juvenile court's finding that Brandon understood the wrongfulness of his conduct.

BACKGROUND

On October 2, 2003, Megan J., then 13 years old, was walking from her middle school to a friend's house. Her other companions left and she noticed two boys across the street who were talking and laughing and pointing at her. The boys then started making rude remarks, using "cuss" words, and calling her names, including "whore."

Megan began to walk back to a friend's house. The boys followed her and started to run towards her. She started to run, but they caught up to her. One boy grabbed her right arm, and the other boy (later identified as Brandon J.), grabbed her left breast. According to Megan, "[he] got me by my left breast, and it kind of hurt at that point." She felt scared and confused. The boys ran on down the street away from her.

Megan walked on to her friend's house and the incident was reported to the police. The next day at school, Megan described her attackers, but could not find their pictures in the yearbook the vice-principal showed her. Then she spotted them on campus, informed the vice-principal and confirmed her identifications, when they were shown to her through a window. She identified the minor here, Brandon J., as the one who grabbed her breast, and another minor, Giovanni P., as the one who grabbed her arm.

At the jurisdictional hearing, Giovanni P. testified that he and Brandon were not involved, but were together at another location. However, Giovanni acknowledged that he had been identified as a coperpetrator and had been placed on informal probation for the offenses. Another boy, Solomon A., testified that he was with Brandon and Giovanni around the time of the incident and did not observe what the victim claimed; however, he admitted Brandon and Giovanni were separated from him for about 5 or 10 minutes and he did not know where they were.

The juvenile petition filed pursuant to Welfare and Institutions Code section 602 charged the minor Brandon J. with three misdemeanors: count 1 – sexual battery (Pen. Code, § 243.4, subd. (a)); count 2 – sexual battery (Pen. Code, § 243.4, subd. (e)); and count 3 – simple battery (Pen. Code, § 242).

At the jurisdictional hearing on February 10, 2004, the charges were found true.

On March 23, 2004, the juvenile court placed the minor on six months probation at home without wardship. The minor timely appeals.

DISCUSSION

I

Penal Code Section 26

The minor first contends that there was insufficient evidence to rebut the statutory presumption that he did not appreciate the wrongfulness of his conduct. Penal Code section 26 provides in pertinent part: "All persons are capable of committing crimes except those belonging to the following classes: [¶] One—Children under the age of 14, in the absence of clear proof that at the time of committing the act charged against them, they knew its wrongfulness. . . ." "However, 'the presumption of a minor's incapacity [may] be rebutted by clear and convincing evidence' that the minor defendant knew the act's wrongfulness. (*In re Manuel L.* (1994) 7 Cal.4th 229, 238.)" (*People v. Lewis* (2001) 26 Cal.4th 334, 378.) "Only if the age, experience, knowledge, and conduct of the child demonstrate by clear proof that he has violated a criminal law should he be declared a ward of the court under [Welfare and Institutions Code] section 602." (*In re Gladys R.* (1970) 1 Cal.3d 855, 867.)

Although clear proof may be needed to prove a child's capacity to understand the wrongfulness of his or her conduct, the substantial evidence standard of review applies with equal force to claims that the evidence does not support the determination that a minor understood the wrongfulness of his conduct. (*In re Paul C.* (1990) 221 Cal.App.3d 43, 52.) "On appeal, we must review the whole record in the light most favorable to the judgment and affirm the trial court's findings that the minor understood the wrongfulness of his conduct if they are supported by 'substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of

fact could have made the requisite finding under the governing standard of proof. [Citations.]' [Citations.]" (*In re James B.* (2003) 109 Cal.App.4th 862, 872.)

"In determining whether the minor knows of the wrongfulness of his conduct, the court must often rely on circumstantial evidence such as the minor's age, experience, and understanding, as well as the circumstances of the offense, including its method of commission and concealment. [Citations.] Generally, the older a child gets and the closer he approaches the age of 14, the more likely it is that he appreciates the wrongfulness of his acts. [Citations.]" (*In re James B., supra*, 109 Cal.App.4th at pp. 872-873.)

The minor had moved to dismiss the petition on the ground of insufficient evidence to show by clear and convincing evidence that he appreciated the wrongfulness of his conduct, in part because the probation report indicated the act was a joke or prank. In denying the motion, the juvenile court stated: "What we have in this case is the following: Calling names which deal with sexual innuendo, grabbing a breast as opposed to any other portion, and then flight afterwards. [¶] And I think that's enough to show that he understood that was wrong, . . ."

We agree. The testimony showed the minor laughed, pointed at the victim, made rude remarks, including using sexual terms. The minor then grabbed a specific intimate body part while the other minor grabbed and held the victim by the wrist. The minors then fled. (See *People v. Lewis, supra*, 26 Cal.4th at p. 379.) The record also reflects that the minor was 3 months away from his 14th birthday when the incident occurred. Thus, he was close to the legal age of presumed capacity. We find this is substantial evidence from which to find, even by clear and convincing evidence, that the nearly-14 year old minor understood the wrongfulness of his conduct.

The minor insists that the commission of the crime itself may not be used to determine his knowledge of its wrongfulness. Thus, he maintains, the actual touching of the breast may not be considered. Although the basic premise is correct, his attempted

application here is overbroad. The minor quotes from *People v. Lewis, supra,* 26 Cal.4th at p. 378: "[Although a] minor's knowledge of wrongfulness may not be inferred from the commission of the act itself, 'the attendant circumstances of the crime, such as its preparation, the particular method of its commission, and its concealment' may be considered." The question in *Lewis* arose in the context of the penalty phase of a capital case, when the defendant protested the use of evidence that he had committed a previous murder when he was 13 years, 9 months old, as an aggravating factor, without a specific finding by the original trial court that he understood the wrongfulness of his conduct. The Supreme Court concluded that there was sufficient evidence to show that he understood the wrongfulness of his conduct, based on his flight from the incident, conflicting statements to investigators, and his age of nearly 14.

Lewis cites to *In re Tony C.* (1978) 21 Cal.3d 888. In that case, the pertinent issue was a potentially erroneous reliance by the juvenile court referee on certain hearsay, i.e., testimony by the mother concerning the minor's understanding of right and wrong given in an earlier petition, to determine the minor's knowledge of wrongfulness in a second petition concerning a different crime. The court determined the erroneous reliance was not prejudicial because there was sufficient other evidence of the minor's knowledge of wrongfulness. "It would manifestly frustrate the intent of Penal Code section 26 to infer such knowledge from the bare commission of the act itself. Yet for this purpose reference may properly be made to the attendant circumstances of the crime, such as its preparation, the particular method of its commission, and its concealment. Reliance on circumstantial evidence is often inevitable when, as here, the issue is a state of mind such as knowledge. [Citation.]" (*In re Tony C., supra,* 21 Cal.3d at p. 900.)

The juvenile court here did not make a finding of knowledge of wrongfulness "from the bare commission of the act itself." Rather, the court considered the context of the minor's touching of a specific intimate body part after he used terms with sexual

connotations. Thus, in accord with *Tony C.*, reference was properly made to the "attendant circumstances of the crime," and "the particular method of its commission."

II

Penal Code Section 243.4

The minor next argues that insufficient evidence supports the finding that the minor committed a violation of Penal Code section 243.4, subdivision (a) [count 1]. The Attorney General concedes that the evidence is insufficient to support the true finding.

To prove a violation of Penal Code section 243.4, subdivision (a), the People must show that the minor touched an intimate part of another who was unlawfully restrained. The statute provides that a female's breast is an intimate part. (Pen. Code, § 243.4, subd. (g)(1).) The statute further requires "physical contact with the skin of another person whether accomplished directly or through the clothing of the person committing the offense." (Pen. Code, § 243.4, subd. (f).)[1]

Megan J., the victim in this case, testified that when the two boys chased and caught her, "One caught me by my right arm and the other got me by my left breast, . . ." "He grabbed me by my breast." There was no testimony about how Megan was dressed or whether the minor's hand touched the skin of her breast. (See *In re Keith T.* (1984) 156 Cal.App.3d 983, 988.)

As this court noted in an earlier case: " '[T]he statutory definition of "touches" in [Penal Code] section 243.4 leads to a reasonable, plain reading that actual direct contact with the skin of the intimate part of another person is essential to the commission of a sexual battery. . . .' [Citation.]" (*In re Gustavo M.* (1989) 214 Cal.App.3d 1485, 1498.)

[1] In contrast, count 2 charged the minor with a violation of Penal Code section 243.4, subdivision (e)(2), which requires "physical contact with [the intimate part of] another person, whether accomplished directly, through the clothing of the person committing the offense, or through the clothing of the victim." The juvenile court found true the allegation that the minor committed a violation of this subdivision in count 2.

The juvenile court rejected the minor's claim that there was no evidence that he touched Megan's skin. But the record shows no evidence; and the Attorney General concedes the true finding on this count must be reversed. We agree.

III

Lesser Included Offense

The minor then asserts that the true finding on count 3 (simple battery) must be reversed because simple battery is a lesser included offense of sexual battery (count 2). Again, the Attorney General candidly concedes the point.

Penal Code section 242 defines a battery as "any willful and unlawful use of force or violence upon the person of another." Penal Code section 243.4, subdivision (e)(1) states that a person is guilty of sexual battery if that person "touches an intimate part of another person, if the touching is against the will of the person touched, and is for the specific purpose of sexual arousal, sexual gratification, or sexual abuse, . . ."

"Under California law, a lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser. [Citations.]" (*People v. Birks* (1998) 19 Cal.4th 108, 117.)

Here, the accusatory pleading alleged, in count 2 that the minor "did commit the crime of VIOLATION OF CALIFORNIA PENAL CODE SECTION 243.4(e)(1), a MISDEMEANOR, committed as follows, to wit: That at said time and place the said minor did willfully and unlawfully touch an intimate part of JANE DOE, against the will and for the specific purpose of sexual arousal, sexual gratification and sexual abuse." Count 3 alleged that on the same day and in the same place, the minor "did commit the crime of VIOLATION OF CALIFORNIA PENAL CODE SECTION 242, a MISDEMEANOR, committed as follows, to wit: That at said time and place the said

minor did willfully and unlawfully use force and violence upon the person of JANE DOE."

Where one conviction is for an offense that is necessarily included in another conviction, the conviction for the lesser offense must be reversed. " '[T]his court has long held that multiple convictions may *not* be based on necessarily included offenses. [Citations.]' (*People v. Pearson* [1986] 42 Cal.3d 351, 355, italics in original.) ' "The test in this state of a necessarily included offense is simply that where an offense cannot be committed without necessarily committing another offense, the latter is a necessarily included offense." [Citations.]' (*Ibid*.)" *(People v. Ortega* (1998) 19 Cal.4th 686, 692.)

Here, the elements required to convict the minor of count 2 by necessity include the elements required in count 3. It is well established that the least touching may constitute a battery, that any use of force against a person in enough. (*People v. Myers* (1998) 61 Cal.App.4th 328, 335.) As stated by the court in *Keith T.,* "[B]attery is a necessarily included offense to the offense with which the minor was charged, i.e., Penal Code section 243.4, sexual battery." (*In re Keith T., supra*, 156 Cal.App.3d at p. 988,[2] see also *People v. Yonko* (1987) 196 Cal.App.3d 1005, 1010 [in finding evidence insufficient to sustain the offense of sexual battery, conviction may be reduced to simple battery where evidence showed defendant guilty of lesser included offense].)

Thus, the true finding on count 3 must be reversed.

IV

Probation Condition

In granting the minor probation, the juvenile court imposed various conditions, including a condition prohibiting the possession of weapons and ammunition. The

[2] As the Attorney General notes, the sexual battery in *Keith T.* concerned the original 1982 version of the statute, which was the same as a violation of the current statute under subdivision (a), requiring, in addition to the elements of subdivision (e), unlawful restraint of the victim and touching of the victim's skin. (*In re Keith T., supra*, 156 Cal.App.3d at p. 986.)

probation order stated: "You shall not possess any weapons or any type of ammunition."[3] Minor did not object to this or any other condition.

Minor now insists that this probation condition, prohibiting him from possessing weapons or ammunition, is unconstitutionally overbroad because it does not include a knowledge requirement. (See *In re Justin S.* (2001) 93 Cal.App.4th 811, 816.) He acknowledges that he failed to raise an objection below, but claims he did not forfeit this issue on appeal because it raises a pure question of law.[4] (See *People v. Welch* (1993) 5 Cal.4th 228, 237.) Minor argues that such a constitutional claim presenting a pure question of law can be resolved without reference to the particular sentencing record developed in the juvenile court. (*In re Justin S., supra*, 93 Cal.App.4th at p. 816; see *People v. Welch, supra*, 5 Cal.4th at p. 235.) The Attorney General points out that the waiver/forfeiture issue is pending in our Supreme Court in *In re Sheena K.,* review granted June 9, 2004, S123980, but explains that the issue need not be addressed here because a knowledge requirement is implied in the condition as imposed. We agree.

The rules pertaining to probation conditions are well established. "Trial courts have broad discretion to set conditions of probation in order to 'foster rehabilitation and to protect public safety pursuant to Penal Code section 1203.1.' (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1120; see [Pen. Code,] § 1203.1, subd. (j); Cal. Rules of Court, [former] rule 410 [renumbered rule 4.410, eff. Jan. 1, 2001].) If it serves these dual purposes, a probation condition may impinge upon a constitutional right otherwise enjoyed by the probationer, who is 'not entitled to the same degree of constitutional

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[3] In announcing the imposition of this specific condition, the juvenile court stated: "Term No. 11 does need to be imposed because if they were monitoring, they don't want to have somebody having a gun or something and shoot them as they come in. That's pretty standard."

[4] Minor alternatively asserts that if in fact he forfeited the right to challenge this condition by failing to object below, he received the ineffective assistance of counsel.

protection as other citizens.' (*People v. Peck* (1996) 52 Cal.App.4th 351, 362.)" (*People v. Lopez* (1998) 66 Cal.App.4th 615, 624.)

The court may impose upon a juvenile ward of the court "any and all reasonable [probation] conditions that it may determine fitting and proper to the end that justice may be done and the reformation and rehabilitation of the ward enhanced." (Welf. & Inst. Code, § 730, subd. (b).) A condition that restricts a juvenile probationer's exercise of constitutional rights may be permissible so long as it is narrowly drawn to serve the important public interests of safety and rehabilitation and tailored to fit the juvenile. (*In re Michael D.* (1989) 214 Cal.App.3d 1610, 1616.) In addition, "a condition of probation that would be unconstitutional or otherwise improper for an adult probationer may be permissible for a minor under the supervision of the juvenile court." (*In re Tyrell J.* (1994) 8 Cal.4th 68, 81.)

Our review of the probation conditions imposed is a deferential one under the abuse of discretion standard. The sentencing court has broad discretion to determine whether an eligible minor is suitable for probation and what conditions should be imposed. "As with any exercise of discretion, the sentencing court violates this standard when its determination is arbitrary or capricious or ' " exceeds the bounds of reason, all of the circumstances being considered." ' [Citations.]" (*People v. Welch, supra*, 5 Cal.4th at p. 234.)

On its face, this probation condition prohibiting the minor from possessing weapons or ammunition serves an important public interest in safety. In supporting his argument that the condition is constitutionally overbroad because it does not include a specific knowledge requirement, minor points to the case of *Justin S.* But in that case, the probation condition at issue prohibited the minor from associating with gang members. The reviewing court added the requirement that the minor not associate with people he knew were associated with a gang. (*In re Justin S., supra*, 93 Cal.App.4th at p. 816; see also *People v. Lopez, supra,* 66 Cal.App.4th at p. 638 [same]; *People v. Garcia*

(1993) 19 Cal.App.4th 97, 102 [condition prohibiting an adult probationer from associating with felons, ex-felons, and users and possessors of narcotics was modified to provide that defendant not associate with persons he knows to be in those categories].)

In the present case, the condition simply stated: "You shall not possess any weapons or any type of ammunition." The condition did not state, as some probation conditions are worded, that the minor shall not be in the presence of people who may have weapons or in a place where weapons are. Such a wording would seem to require the addition of a knowledge element. But we read the words "shall not possess any weapons" to encompass knowing possession. (Cf. *People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090 [preliminary injunction prohibiting designated street gang members and specified activities in four-square-block neighborhood was not constitutionally overbroad or vague in certain prohibitions because the element of knowledge was implied].) Indeed it is hard to imagine a situation where the minor could unknowingly possess a weapon. Thus, we decline to modify the probation condition.

DISPOSITION

The petition is modified to reverse the true findings as to count 1 and count 3. On the petition as so modified, the order of probation is affirmed.

Walsh, J.*

WE CONCUR:

Rushing, P.J.

McAdams, J.

*Judge of the Santa Clara County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.